Appendix D2

Water Availability Issues

MEMORANDUM

To: Jemez y Sangre Legal Subcommittee

From: Susan Kery; Letty Belin; John Utton

Date: June 22, 2001

Re: Water Availability Issues

TABLE OF CONTENTS

I. Introduction.

The Jemez y Sangre Legal Subcommittee has identified a number of issues that may affect water availability in the region. These issues are (1) the use and regulation of domestic wells; (2) the transfer of water across the Otowi Gage; (3) re-use of return flows; (4) the NEPA process; and (5) Endangered Species Act compliance. Each of these issues is addressed below.

II. The Use and Regulation of Domestic Wells

The use and regulation of domestic wells within the Jemez y Sangre planning region is of

critical importance if it is to realistically plan for use of water within the region. Under the New Mexico Water Code, an applicant may receive a domestic well permit from the State Engineer without acquiring commensurate groundwater rights or retiring offsetting surface water rights.[1] Because obtaining a domestic water right permit is essentially a ministerial process, it is viewed by many both as a loophole in the regulation of groundwater withdrawals and as an obstacle to the use of water supply as a growth management tool.

A. Appropriation and Use of Domestic Water

The starting point for any analysis of domestic wells is the statute governing domestic wells, NMSA 1978, § 72-12-1. That statute states that underground waters are "declared to be public waters and to belong to the public and to be subject to appropriation for beneficial use." The statute bases the policy allowing for domestic wells on "the varying amounts and time such water is used and the relatively small amounts of water consumed in the watering of livestock, in irrigation not to exceed one acre . . . in household or other domestic use, and in prospecting, mining or construction of public works, highways and roads or drilling operations designed to discover or develop the natural resources of the state." NMSA 1978, § 72-12-1. The statute then describes the process for applying for a domestic well. Historically, the statute has not given the State Engineer discretion to deny a permit application: "[u]pon the filing of each application. . . the state engineer shall issue a permit." Id.

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[1] § 72-12-1 NMSA 1978 (2000 Cum. Supp.).

The domestic well statute was amended by Senate Bill 602 during the 2001 legislative session to include a provision conditioning the statutory mandate. The new law requires the State Engineer to issue permits " if applications for domestic water use within municipalities conform to all applicable municipal ordinances and an application is made for a municipal permit pursuant to Chapter 3, Article 53 NMSA 1978." The ramifications of this amendment, which became effective on June 15, 2001, are potentially far-reaching and are discussed below.

The State Engineer has issued regulations[2] pertaining to domestic wells.[3] Groundwater Regulation 1-15 excepts domestic well applications from publication and notice. Groundwater Regulation 1-15.2 limits the amount of water diverted under a Section 72-12-1 permit to three acre-feet per annum. Groundwater Regulation 1-15.3 lists the types of uses allowed under a Section 72-12-1 permit as household and other domestic use for one or more residences; rental units constructed on land owned by the applicant; drinking and sanitary purposes and the irrigation of non-commercial trees, shrubs and lawn that are incidental to a commercial enterprise, provided that the water is not used for any commercial purpose; and livestock water. These latter two regulations pertaining to amount and use are limited by Groundwater Regulation 1-15.8, which states that such amount and uses of water "are subject to such limitations as may be imposed by the courts."

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[2]The State Engineer's authority to adopt regulations is granted pursuant to NMSA 1978, § 72-2-8.

[3]These regulations are included in the "*Rules and Regulations Governing Drilling of Wells and Appropriation and Use of Ground Water in New Mexico* (1995)."

The State Engineer requires submission of a form to apply for a domestic well.[4] Section 3 of the form provides for the applicant to check off the particular use of water "not to exceed one acre," but does not require the applicant to specify with certainty the amount of water requested. The "General Conditions of Approval" applying to domestic well permits capture the essence of the statute and regulations governing domestic wells. The following conditions apply to all domestic well permits:

- The maximum amount of water that may be appropriated under the permit is three acre-feet in any year.
- If the well under the permit is used at any time to serve more than one household or livestock watering, or for drinking and sanitation purposes in conjunction with a commercial operation, the permittee shall notify the State Engineer Office in writing.
- In the event the well is combined with other wells permitted under Section 72-12-1, the total outdoor use shall not exceed the irrigation of one acre of non-commercial trees, lawn, and garden, or the equivalent outside consumptive use, and the total appropriation for household and outdoor use from the entire water distribution system shall not exceed three acre-feet in any year.
- The amount and uses of water permitted are subject to such limitations as may be imposed by the courts or by lawful municipal and county ordinances which are more restrictive than applicable State Engineer Regulations and the conditions of this permit.

It is noteworthy that this last condition does not have a statutory corollary deferring to local ordinances, except for the recent amendment passed in Senate Bill 602. Nonetheless, as discussed below, the general police powers of local governments likely provide such authority.

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[4]The form is entitled "*New Mexico State Engineer Office Application for Permit to Use Underground Waters In Accordance With Section 72-12-1 New Mexico Statutes.*"

Furthermore, the State Engineer has been granted the power to meter domestic wells pursuant to NMSA 1978, §72-12-27, which states that the State Engineer "may require pertinent data to be filed with respect to each well, and may require water produced therefrom to be metered and the volume thereof reported." Despite this grant of power, the State Engineer has not required state-wide metering of all domestic wells.

Metering is addressed in Groundwater Regulation 1-15.7, which requires all Section 72-12-1 wells to be metered, except for those used for a single household or stock watering. This regulation further states "[i]f two or more wells are connected to the same distribution system, all water diverted from the wells shall be metered with one or more meters and the total diversion from all wells combined shall be limited to three acre-feet per annum." Groundwater Regulation 1-18.1 re-emphasizes the metering requirement, by stating that "[n]othing herein shall limit the authority of the State Engineer to require a meter as a condition of approval for any permit granted by the State Engineer, except withdrawals for groundwater solely for single household domestic uses or stock watering uses." Groundwater Regulation 1-18.6 goes on to state "[i]n the exercise of statutory authority to measure the public waters, the State Engineer shall consider Article 1-18 [Requirements for Metering Groundwater Withdrawals] and any court orders regulating the use of ground water. If there is an inconsistency between this article and an order of the court, the court's order shall control." Because several adjudications are under way in the basin, the prospect of court orders regulating domestic well rights should be expected, especially one final decrees are entered and basins are administered by priority. In State of New Mexico v. Aamodt (adjudication of Pojoaque/Tesuque/Nambe

stream system), the court has already limited new domestic well uses on an interim basin, even before entry of a final decree. Once a final decree is entered, further restrictions could be placed on domestic wells.

Another area of state regulation of domestic well use concerns well-sharing. Although the State Engineer has not prohibited well-sharing, and in fact, seems to encourage it,[5] there is a restriction of three acre-feet per annum as the amount of water which can be diverted from one domestic well. Again, though, based on the powers granted to municipalities, and on the new language amended to § 72-12-1, municipalities could impose restrictions on well-sharing. Nonetheless, it appears that the better restriction would be on the total amount of water that could be diverted from any one domestic well.

The State Engineer currently allows interconnection of domestic wells, as long as the total amount taken from the combined wells does not exceed three acre-feet per annum. Each domestic well permit as a condition which states that "[i]n the event this well is combined with other wells permitted under Section 72-12-1, the total outdoor use shall not exceed the irrigation of one acre of non-commercial trees, lawn, and garden, or the equivalent outside consumptive use, and the total appropriation for household and outdoor use from the entire water distribution system shall not exceed three acre-feet in any year."

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[5]Groundwater Regulation 1-15.3 lists the types of uses allowed under § 72-12-1 as household and other domestic use for one or more residences; rental units constructed on land owned by the applicant; drinking and sanitary purposes and the irrigation of non-commercial trees, shrubs and lawn that are incidental to a commercial enterprise, provided that the water is not used for any commercial purpose; and livestock water.

B. Legal Basis for State Engineer Prohibition of Domestic Wells.

Given the strong statutory mandate of § 72-12-1 for the issuance of domestic well permits, it is arguable that such wells could be disallowed only when their approval would conflict with the state's constitutionally-created prior appropriation system. The statute governing domestic wells must be examined in light of the provisions in the New Mexico Constitution. Article XVI, § 2 of the New Mexico Constitution governs the appropriation of water. It states that the "unappropriated water . . . within the state of New Mexico is hereby declared to belong to the public and to be subject to appropriation for beneficial use, in accordance with the laws of the state. Priority of appropriation shall give the better right." (Emphasis added.) Article XVI, § 3 of the New Mexico Constitution describes beneficial use as "the basis, the measure, and the limit of the right to the use of water." These two constitutional provisions, as they relate to groundwater, are codified in NMSA 1978, § § 72-12-2 and 3. In analyzing the beneficial use provision, the New Mexico Supreme Court has stated that a person is not entitled to receive more water than is necessary for actual use. State v. McLean, 62 N.M. 264, 308 P.2d 83 (1957).

A strong argument can be made that the domestic well statute as applied in certain circumstances is contrary to the constitutional provisions stated above. Pursuant to the New Mexico Constitution, only unappropriated water is available for appropriation and junior rights must be administered according to their priority. For instance, it would be contrary to the prior appropriation doctrine if new or existing junior groundwater users were allowed to cause depletions of connected surface flows, thereby depriving surface diverters from exercising senior priority water rights. Furthermore, it may be contrary to the constitutional

requirement of beneficial use of water to for each domestic well to pump up to three acre-feet per annum, when any use in excess of a small fraction of that amount would likely constitute waste.

The State Engineer has been granted broad powers by the New Mexico Legislature pursuant to NMSA 1978, § 72-2-1 (the State Engineer "has general supervision of waters of the state and of the measurement, appropriation, distribution thereof and such other duties as required.") See also NMSA 1978, § 72-2-9; Reynolds v. Aamodt, 111 N.M. 4, 800 P.2d 1061 (1990). Because of these powers and the constitutional requirements of beneficial use and protection of priority, the State Engineer may have both the authority and the obligation to prohibit new domestic wells when necessary to comply with the Constitution.

Such a prohibition may be most compelling in the adjudication context. Several of the tributaries in the planning region are subjects of stream system adjudication suits. Once these cases are complete, it is likely that the Court will appoint a water master to oversee the administration of priorities. In instances where recent junior domestic wells are depleting surface flows, the water master and/or the Court may regulate or could prohibit the use of such wells if their use interferes with the exercise of senior water rights. Found in these tributary basins are very old Pueblo and acéquia water rights which would have first priority. Indeed, in the Aamodt case, even before conclusion of the adjudication, the Court has approved or ordered restrictions on the amount of water that may be used from newer domestic wells. Where existing rights afford little or no room for additional withdrawals from am aquifer, persons in need of domestic water may have to purchase water rights to transfer to their property or tie into a community system.

C. Possible Local Government Restrictions and Conditions on Domestic Well Use.

As discussed above, under the New Mexico Water Code, an applicant may receive a domestic well permit from the State Engineer without acquiring commensurate groundwater rights or retiring offsetting surface water rights;[6] nonetheless, county and municipal regulations may also be important in the regulation of domestic wells. In that regard two issues are discussed in this section: (1) do local governments have the legal authority to regulate both the amount and use of domestic wells, including requiring metering of well pumping?; and, (2) Can local regulations be applied only to new wells, or may they be applied retroactively?

1. Legal Authority for Local Regulations.

As discussed above, the State Engineer has adopted a domestic well permit condition providing: "the amount and uses of water permitted under this Application are subject to such limitations as may be imposed by the courts or by lawful municipal and county ordinances which are more restrictive than applicable State Engineer Regulations and the conditions of this permit." The State Engineer's policy of deferring to local restrictions is undoubtedly premised on the general police powers of municipalities and counties, which enable them to restrict domestic well pumping. Municipalities' general police powers are granted by NMSA 1978, § 3-18-1 ("a municipality may protect generally the property of its municipality

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[6] § 72-12-1 NMSA 1978 (2000 Cum. Supp.).

and its inhabitants.") This section confers a police power upon municipalities to protect their inhabitants and a municipality may adopt ordinances for this purpose under the authority of NMSA 1978, § 3-17-1A. City of Hobbs v. Biswell, 81 N.M. 778, 473 P.2d 917, cert. denied, 81 N.M. 772, 473 P.2d 911 (1970).

Likewise, counties are granted general police powers under state law. County authority arises from statutory law providing that all "counties are granted the same powers that are granted municipalities...[including those powers] necessary and proper to provide for the safety, preserve the health, promote the prosperity and improve the morals, order, comfort and convenience of any county or its inhabitants."[7] Although counties have placed restrictions on domestic wells as part of the subdivision approval process, no county in the planning region has imposed regulations that apply generally to the drilling and use of domestic wells.[8]

In general, it is unlikely that a local government could institute an outright ban on new domestic wells based on police powers alone. Such a prohibition would fall within the domain of the State Engineer administration or the jurisdiction of an adjudication court or special master. Nonetheless, local governments could prohibit new domestic wells, and could possibly phase-out existing wells, as discussed below, based on specific statutory authority or where a reasonable alternative supply is available.

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[7] § 4-37-1 NMSA 1978 (1992 Repl.).

[8] Santa Fe County has limited the amount of water that can be created by subdivision or exemption for most lots (i.e., lots smaller than the standard lot size) to one-quarter acre-foot per household. See generally Art. III, Section 6 of the Santa Fe County Land Development Code.

For example, municipalities and counties may regulate water use by assuming responsibility for supplying water to their residents. By owning and operating a water utility, a county or municipality may regulate water use, including imposition of conservation measures. Municipalities may exercise their powers of eminent domain to establish or expand water utilities. A municipality "within and without the municipal boundary" may condemn various water supplies, water rights, rights-of-way "or other necessary ownership for the acquisition of water facilities."[9] Counties, like municipalities, may own utilities. Certain class B Counties (*i.e.*, Santa Fe County), are specifically authorized by statute to purchase, own, operate and sell water and sewer utilities.[10] Furthermore, counties are specifically empowered to condemn water rights.[11] Class H Counties (*i.e.*, Los Alamos) also have the power to condemn property for water facilities because they are included in the definition of municipality in the water code.[12]

Both the City of Santa Fe and Santa Fe County have used the existence of public water utilities to prohibit drilling of new domestic wells within 200 feet of a utility water line.[13] The City of Santa Fe has adopted a municipal ordinance which provides for the denial of permit applications for new domestic wells if the applicant's property boundary is within 200 feet of a water distribution main. Pursuant to this

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[9] § 3-27-2(A)(1) NMSA 1978 (1995 Repl.).

[10] § 4-36-8 NMSA 1978 (2000 Cum. Supp.).

[11] §§ 72-4-2 – 72-4-12 NMSA 1978 (1997 Repl.).

[12] §§ 3-27-2(A) NMSA 1978 (1995 Repl.), 3-1-2(G) NMSA 1978 (2000 Repl.).

[13] *See* City of Santa Fe Ordinance No. 1993-3, adopted January 13, 1999.

ordinance, domestic well applications will be granted where the applicant's property boundary is greater than 200 feet from a water distribution main, provided that the applicant has applied for and received a domestic well permit from the State Engineer and four conditions are satisfied. Conditions include that the well be metered, and monthly usage recorded and reported annually to the City of Santa Fe water division. The other conditions pertain to drilling requirements and easements. The ordinance was passed in 1999 as Ord. #1999-3, § 1, and is codified in the City of Santa Fe Code at 25-1.10. Under the similar Santa Fe County ordinance, customers of the county water utility are required to disconnect and discontinue use of domestic wells upon hooking up to the county water system.[14]

A significant recent legislative development is the passage by the 2001 legislature of Senate Bill 602, providing specific statutory authority for local regulation of domestic wells. Effective June 15, 2001, municipalities, and perhaps counties,[15] have the power to restrict by ordinance the drilling of new domestic water wells, except for property zoned agricultural, if the property line of the applicant is within 300 feet of the municipal water distribution lines and the property is located within the exterior boundaries of the municipality. A municipality may not deny a new domestic well permit if the total cost to the applicant of extending the municipal water lines, meter and hook-up exceeds the cost of drilling a new well. A

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[14] Santa Fe County Water Utility Policy for Allocation of Water Rights, adopted Resolution No. 1999-41, March 30, 1999.

[15] Counties could derive such authority from § 4-37-1 NMSA 1978 (1992 Repl.) ("counties are granted the same powers that are granted municipalities...[including those powers] necessary and proper to provide for the safety, preserve the health, promote the prosperity and improve the morals, order, comfort and convenience of any county or its inhabitants.")

municipality declining to authorize a new domestic well must provide domestic water service within 90 days at regular rates. Existing wells are not affected by the legislation.

In order to exercise this authority, a municipality must adopt a well regulation ordinance and file it with the State Engineer Office. An applicant in a municipality with a new well ordinance must obtain a permit to drill from the municipality subsequent to State Engineer approval. A municipality must notify the State Engineer of its denial of drilling permits and an applicant may appeal a denial to the district court. The legislation creates a new section of Chapter 3 (Municipalities), Article 53 NMSA 1978, and amends §72-12-1 (groundwater statute) to require the State Engineer to grant a permit for a domestic well within municipal boundaries provided it conforms to all applicable municipal ordinances. The amendment (underlined) reads: "Upon the filing of each application describing the use applied for, the state engineer shall issue a permit to the applicant to so use the waters applied for <u>if applications for domestic water use within municipalities conform to all applicable municipal ordinances and an application is made for a municipal permit pursuant to Chapter 3, Article 53 NMSA 1978</u>." Thus, effective June 15, 2001, all domestic well applications filed with the State Engineer must conform to municipal ordinances governing domestic wells, as well as to the new statute allowing municipalities to prohibit domestic wells near water lines.

Finally, based again on their broad police powers and their ability to regulate wells, municipalities and counties could impose metering requirements. In particular, the amendment to the domestic well statute (the state engineer shall issue a domestic well permit <u>if</u> applications for domestic water use within

municipalities conform to all applicable municipal ordinances) appears to mandate that the State Engineer recognize any domestic well ordinance, which would include a metering ordinance.

2. County Regulation of Domestic Wells within Subdivisions.

The final domestic well issue raised by the legal subcommittee is whether subdivisions can be required to obtain a water right or water supply, other than from § 72-12-1 wells. Again, based on its overall police powers, its power to regulate wells, and the authority to enact ordinances provided for as of June 15, 2001 in § 72-12-1, a municipality can restrict the use of domestic wells within subdivisions.

Such restrictions are already occurring in Santa Fe County, as shown by the domestic well provisions under both its Land Development Code and its Extraterritorial Zoning Ordinance. Article III, Section 6 of the Land Development Code contains multiple references to county domestic well regulation. Subsection 6.2.2 addresses required water rights permits for subdivisions. Specifically, part 6.2.2b requires that for all subdivisions within a critical water basin identified by the Board of County Commissioners, proof of a valid water permit other than domestic wells, be provided prior to plat approval.

Subsection 6.3 of the Land Development Code discusses mandatory community water systems. Part 6.3.1 provides that the drilling or use of individual and/or shared domestic wells is strictly prohibited in a subdivision requiring a community water system. The Code requires community water systems according to the number and size of lots indicated in its subdivision regulation, Article V, Section 9.3. For

instance, community water systems are required in subdivisions from five to twenty-four lots, with lot sizes ranging from less than one acre to 2.5 acres each, in subdivisions from twenty-five to ninety-nine lots (including "cluster developments" of twenty-five or more dwelling units) with lots ranging from less than one acre to ten acres, and in subdivisions of one hundred or more lots, with lot sizes ranging from less than one acre to forty acres. Article V, Table 5.1 & Section 9.3, Santa Fe Land Development Code.

Even when domestic wells are permitted in developments, certain requirements must be met. Subsection 6.4 of the Land Development Codes water addresses availability assessments. Part 6.4.1d requires that for developments where the source of water will be individual domestic wells or shared wells, the applicant must demonstrate a 100-year supply and submit a geohydrologic report in accordance with subsection 6.4.5 or a reconnaissance water availability assessment in accordance with subsection 6.4.6 if applicable.

Subsection 6.4.5 applies to subdivisions containing six or more lots and developments where the source of water will be individual domestic wells or shared wells. The subsection requires that the applicant submit a water availability assessment which includes a geohydrologic report conforming to the requirements of Section 6.4.2 and Table 7.5. Alternatively, Subsection 6.4.6 allows for the submission of a reconnaissance water availability assessment in lieu of a geohydrologic report should a domestic well meet six requirements.

Subsection 6.4.7 sets forth the requirements for water availability assessments for subdivisions of five or fewer lots. Specifically, Part 6.4.7b provides that if the source of water is individual domestic wells,

the applicant must submit the following information as their water availability assessment: (I) at least one well log from an on-site well or from an existing well located within one mile of the property boundary completed in geologic conditions representative of the conditions within the proposed project; (ii) a description of the water bearing formation including a statement of the maximum and minimum depths to water in the subdivision and the basis for these statements; (iii) a statement of the estimated yield of wells in gallons per minute based upon well logs from existing nearby wells; and (iv) any additional information which is required by the Board that will enable it to determine whether or not the subdivider can fulfill the proposals contained in the disclosure statement.

The Santa Fe Extraterritorial Zoning Ordinance Sections 3 and 10 also contain domestic well provisions (Ordinance No. EZA 1999-3). Section 3.3 B provides that in order to obtain a development permit to build within the Extraterritorial Zoning District, applicants must provide proof that a [domestic] well was constructed prior to January 1, 2000, a copy of authorization to connect to a regional water system or a post-January 1, 2000, drillers' well record proving that the [domestic] well was constructed per Section 10.1. A standards.

Section 10.1 addresses required improvements. Specifically, Section 10.1 A. 1 discusses water supply and states that domestic wells are permitted only where regional water is not available:

> Any proposed development shall provide water for the intended use of the development (domestic, commercial/industrial, recreation) either by meeting the standards of lot size and water availability for individual or cluster wells pursuant to Article VII, Section 6 of the County Land Development Code and Sections 3 and 5 of this Ordinance or through installation or extension of a community water system. It is the intent of this ordinance to protect public health and groundwater

> quality and encourage conservation by minimizing the number of individual wells by requiring connections to regional water systems and encouraging shared wells where possible. Drilling of any new domestic well is prohibited on lots located within 200 feet of an existing regional water system distribution line when regional water is available. "Available"is defined for the purposes of this section as the regional water system director agrees to provide service and is ready, willing and able to provide water service within 90 days of a written request, and the cost of connecting the point of use per the County Hydrologist's standard specifications. Lots created after January 1, 2000, shall be required to disconnect within 90 days from any domestic well when regional water service becomes available and are required to dedicate a ten (10) foot wide utility easement along all property lines for future potential water distribution lines.

Section 10.1 A.2 (a) states that where new lots are created and the proposed minimum lot size is less that five acres per dwelling unit, connection to or construction of a community water system (or a cluster well water system for four units of less) is required. Part 10.1 A 2. (d) provides well criteria for all permissible wells [including domestic] where regional water is not available (see 10.1A.3.(a) for well criteria).

3. Prospective vs. Retroactive Application of Local Regulations.

Whether local governments would be limited to implementing these proposed regulations prospectively, or may impose them retroactively is not clear. A county or municipality has the authority to enact zoning regulations to regulate the use of land within its jurisdiction pursuant to statutory requirements. NMSA 1978, § 3-21-1; see also NMSA 1978 3-21-6. Such regulations are valid exercises of the police powers of each entity. Miller v. City of Albuquerque, 89 NM 503, 544 P.2d 665 (1976). Arguably, this authority includes the ability to restrict domestic water use. However, attempts by local governments to

enforce retroactive, rather than prospective, regulations may be subject to legal challenge under the Fifth Amendment Takings Clause, if they go too far.

The general rule is that a regulation that imposes a reasonable restriction on the use of private property will not constitute a 'taking' of that property if the regulation is (1) reasonably related to a proper purpose and (2) does not unreasonably deprive the property owner of all, or substantially all, of the beneficial use of his property. The Estate and Heirs of Isabel Sanchez v. County of Bernalillo, 120 NM 395, 397, 902 P.2d 550 (1995)(citing Temple Baptist Church, Inc. v. City of Albuquerque, 89 NM 503, 505, 554 P.2d 665, 667 (1976)).

While the prevailing rule does not address retroactive regulations specifically, such regulations appear valid providing that they satisfy the above rule. For instance, a city or county's retroactive domestic well metering requirement likely would be permissible as such a requirement would not unreasonably deprive the domestic well user of "all or substantially all" of the beneficial use of her water. Likewise, restrictions on water use in times of drought likely could bee imposed on domestic well owners within a local government's boundaries. On the contrary, retroactively restricting water use below historic use levels may constitute a taking if it were to limit "substantially all" of the domestic user's water right.

D. Transfer of Domestic Water Rights into a Community System

Another issue is whether a domestic water right can be aggregated and transferred into a common or central water system. There are many examples in New Mexico of the State Engineer approving

transfers of domestic rights into community water systems, such a mutual domestic associations.[16] However, because the State Engineer Office has at various times stated reservations about this practice and has not established formal procedures governing it, the question arises of the legal basis for this method of creating a community water system.

First, the domestic well statute does not contain any language limiting the transferability of domestic water, nor are there any constitutional provisions which would do so. It is established that a water right is a real property right. See New Mexico Prods. Co. v. New Mexico Power Co., 42 N.M. 311, 77 P.2d 634 (1937) ("A water right is property and held to be real property by most authorities.") Further, there is no language in the water transfer statute that would somehow distinguish a domestic water right as a type of water right that cannot be transferred.

Transfers of groundwater rights are governed by NMSA 1978, §72-12-7. Pursuant to this statute, the owner of a water right may change the location of a well, or change the use of water, but only upon application to the State Engineer and upon showing that the change will not impair existing water rights, will not be contrary to the conservation of water within the state, and will not be detrimental to the public welfare of the state. In reviewing an application to transfer domestic well rights into a community system, the State Engineer will require a showing that the proposal will not result in increased withdrawals from the

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[16] New Mexico law provides for the formation of mutual domestic water associations. NMSA 1978, § § 53-4-3 and 43-4-1(A). Mutual domestic water associations are formed through the incorporation of any five or more individuals or two or more associations. NMSA 1978, § § 53-4-2.

stream system. In other words, the current statutory exemption provided by § 72-12-1 may not be used to create a water rights loophole community-wide. The problem can be solved by limiting transfers to the perfected amount of the domestic well and, after the transfer, disallowing further perfection of domestic rights in the same well.

The City of Espanola is seeking to transfer excess domestic rights into its municipal system. The city has enacted an ordinance which "encourages" domestic well owners within the city corporate limits to transfer to the city any unused portion of their domestic well right not used for inside purposes and for which municipal water is being provided. The provision allows for the compensation of domestic well owners pursuant to a specific schedule "to be developed based on amount of acre feet transferred." Espanola Utility Ordinance Sec. 98-48(f). However, according to the State Engineer transfer policy, the amount of water that a water right holder may transfer is limited to the perfected amount. For instance, if a domestic well owner has a permitted right for three acre-feet of water per year, but has only put 1 acre-foot to beneficial use, the actual water right is 1 acre-foot.

Currently, there is a limited market for domestic water rights, since anyone can apply for one. But, if the State Engineer or a court were to prohibit new domestic wells in fully appropriated basins, or limit the amount of water that can be used pursuant to a domestic well permit, a more active market for domestic water might develop.

III. Transfer of Water Across the Otowi Gage.

The State Engineer's administration of water right transfers in conformance with the Rio Grande Compact[17] will affect the availability of water in the planning region. Under the Compact, which was agreed to by the States of New Mexico, Colorado and Texas in 1938, deliveries downstream are set under an inflow-outflow schedule. Deliveries to New Mexico from Colorado are calculated by upstream gages, pursuant to Article III of the Compact. Likewise, pursuant to Article IV, New Mexico's obligation to deliver water to the Rio Grande Project at Elephant Butte Reservoir is determined by reference to the index supply at the Otowi gage, located on the river on San Ildefonso Pueblo. Based on the quantity of flows measured at Otowi, the Compact establishes a delivery schedule of the amount of native flows that must be delivered to Texas at the Reservoir.[18]

Because of the Otowi Gage's role in determining delivery amounts, the State Engineer has a long-standing administrative practice of not permitting a change in point of diversion from one side of the gage to the other, whether permanent or by lease. A change in point of diversion from one side to the other would either increase or decrease flows measured at the gage, thereby altering the delivery requirement downstream, unless a compensating adjustment were agreed to by the three states. In order to avoid

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[17] § 72-15-23 NMSA 1978 (1997 Repl.)

[18] It is important to note that imported San Juan-Chama water is exempt from the Compacts inflow-outflow requirements. Article X provides that water imported into the basin is excluded from inflow-outflow calculation and, therefore may be fully consumed anywhere in the Rio Grande Basin, above Elephant Butte Reservoir..

proposing such adjustments, the State Engineer has simply treated the Rio Grande Basin below and above the gage as two distinct basins. By contrast, the State Engineer has not expressed an official position regarding a change of place of use of a water right from one side to the other.[19]

Because the Otowi Gage is located in the approximate middle of the Jemez y Sangre planning region, a critical question is how administration of water right transfers within, to or from the planning region could affect water availability. Development of water resources has been, and is likely to continue to be, more significant below the gage than above as reflected by a higher price for water rights in the middle valley than on the mainstem in northern New Mexico. Therefore, it is reasonable to assume that any proposed transfer would be from above to below the gage.

Administrative prohibition of transfers across the gage has the effect of protecting against the net loss of water rights in northern New Mexico, including the planning region. Clearly, a ban on changes of points of diversion to the middle valley benefits that portion of the planning region above the gage. Although individual water right holders may not be able to market their rights to the highest bidder, the northern half of the region is likely better off because its existing water resources are not susceptible to predation by and export to the middle valley and because in acquiring additional water rights, it does not have to compete with Albuquerque and other middle valley uses with growing demands.

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[19]The difference in the inquiry is illustrated by the following: An appropriator, piping water from his original point of diversion to another basin, is changing the place of use of his water right. However, he is not changing the point of diversion.

By contrast, the southern portion of the planning region, in particular the Santa Fe area, may have the distinct disadvantage of being in the middle valley basin or market, when points of diversion and regional distribution systems would more appropriately be located or engineered across the Otowi Gage, or by a combination of diversions along the river, both above and below the gage. What may give the Santa Fe area some relief is the ability to change the place of use, even if not the point of diversion, of a water right from above to below the Otowi Gage. Under that scenario, water diverted above the Otowi Gage could be piped and used south of the gage. Such flexibility would allow for distribution of water within the region where reasonably needed, and would not limit the Santa Fe area to the middle valley market. On the other hand, for those not wishing to see reallocation of water within the region or within northern New Mexico generally, particularly from agricultural to municipal uses, transfers across the gage, even if limited to changes of place of use, could be troubling.

This issue has become important because the City and County of Santa Fe are actively studying the construction of a Rio Grande surface water diversion on San Ildefonso Pueblo lands north of the gage. From the diversion facility, the diverted water would be pumped and used predominantly in the Santa Fe sub-basin, which is south of the gage. Although the use of San Juan -Chama water below the gage is explicitly allowed by Article X of the Compact, the question has arisen whether the place of use of northern, native rights could be changed to the Santa Fe area, even if the diversion point remains above the gage.

Change of place of use of a surface water right is governed by 72-5-23 NMSA 1978. The statute requires that a surface water transfer applicant demonstrate: 1) the transfer will not impair existing water rights; 2) the transfer is not contrary to the conservation of water within the state; and 3) the transfer is not detrimental to the public welfare of the state.[20]

The non-impairment criteria is satisfied as long as the change in place of use does not impair existing water rights within the basin. To assure such nonimpairment, the policy of the State Engineer is to approve transfer of only the consumptive portion of a surface water right, as opposed to the entire diversionary amount including return flow. This standard is consistent with the transbasin export statute, which provides for the diversion of surface water from one water shed to another.[21] The statute allows a transbasin transferor to "take and use the same quantity of water, less a reasonable deduction for evaporation and seepage to be determined by the State Engineer."[22]

Satisfaction of the second and third requirements for a valid transfer, conservation and public welfare is less clear, in part because these conditions were made requirements by amendment to state law only recently, in 1985.[23]

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[20]§72-5-23 NMSA 1978 (1997 Repl.).

[21]§72-5-26 NMSA 1978 (1997 Repl.).

[22] Id.

[23]See annotations to §72-5-23 NMSA 1978 (1997 Repl.).

The public welfare requirement, in particular, is largely open-ended and undefined. Of the three transfer criteria, public welfare is the least understood. A precise definition of "public welfare" as it appears in the statute has not been articulated by the state legislature, the courts or the State Engineer. Inter-basin transfers of water from above the Otowi Gage to below the gage will be questioned on public welfare grounds.

During the 2001 state legislative session, two House Joint Memorials were passed on water rights transfers across the Otowi Gage.[24] House Joint Memorial 6 supports and endorses the continuation of the State Engineer's policy of prohibiting surface water transfers from above the Otowi Gage to below it. The Memorial's anti-transfer position is framed by public welfare concerns. The Memorial bases its position on harm to acequia communities, local economies and Compact delivery obligations caused by cross-basin Otowi transfers. Specifically, House Joint Memorial 6 states:

> It is detrimental to the public welfare of the state of New Mexico for the Office of the State Engineer or any other relevant state agency to approve water right transfer applications designed to move the point of diversion or place of use of water rights from above the Otowi stream gage to a new point of diversion or a new place of use below the latitude of the Otowi stream gage.

Thus, the Memorial is broader than the current State Engineer policy prohibiting cross-basin changes to points of diversion; rather, the Memorial objects to cross-basin changes to places of use, as well.

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[24]House Joint Memorial 6, 45th Legislature, State of New Mexico, First Session 2001; House Joint Memorial 14, 45th Legislature, State of New Mexico, First Session 2001.

House Joint Memorial 14 is virtually identical to House Joint Memorial 6, and in addition requests the State Engineer formalize a policy of prohibiting water rights transfers from above the latitude of the Otowi Gage to below that latitude.

Although these memorials do not carry the force of law, they do represent a water allocation preference that must be taken into account. If a regional plan protects one portion of the planning region to the detriment of another portion, such a result must be carefully considered. In addition, because restrictions on the use of a water right may unduly interfere with exercise of a property right or could impermissibly infringe on interstate commerce, compliance with the U.S. Constitution's Fifth Amend protections against takings and the Commerce Clauses protection of interstate commerce must be considered.

IV. Reuse of Return Flows.

An important issue to municipalities, counties and other entities that supply water and treat wastewater is the reuse of return flows. In some instances, such an entity may wish to reuse effluent to meet growing municipal demands. Such reuse will result in less water returning to the river system for use by other users and, consequently, raises questions of whether State Engineer approval is necessary and whether downstream users may oppose the reuse. Another type of reuse occurs when the water user seeks to increase its diversions based upon the amount of return flows it makes to the river system. Diversions may be increased by approval by the State Engineer of a return-flow plan that has the effect of crediting the water user with the return flows and allowing diversions to increase in the same amount.

From a legal standpoint, a right to divert water provides its user with two types of water: the diversion portion, which equals the total amount withdrawn from the stream system, and the consumptive use portion, which is the portion that is consumed. Any amount left over that returns to the stream system by seepage, discharge or even injection is a return flow. Where the State Engineer has already issued a permit to divert a specified quantity of water but with no stated return-flow requirement or consumption limitation, the question remains what portion of the quantity diverted may be consumed.

In the case of Reynolds v. City of Roswell, 99 N.M. 84, 654 P.2d 537 (1982), the New Mexico Supreme Court addressed the issue of the State Engineer's imposition of a return-flow requirement on a city permit that previously contained no condition.. The court held that the requirement was unlawful, concluding that all of the water appropriated under the permit could be used and consumed by the city, as the water was "artificial" water belonging to the city . Id. at 87-88, 654 P.2d at 540-1.

A more complex question concerns a municipality's ability to reuse waters when some or all of its permits contain discharge requirements. A return-flow condition will typically require a city to return all measurable return flow to the river, including sewage effluent, or may state a percentage of pumping, such as 30 percent, that must be returned to the river system. Under these circumstances, the municipality may not use more than its consumptive use right. But, it could reuse some or all of its effluent if it reduced its pumping correspondingly, so that the total consumptive use did not increase. In other words, by limiting pumping under a permit to the consumptive right and replacing any consequent shortfall in municipal supply with effluent, the municipality could make use of its return flows within its legal authority. Again, as long

as the substitution of effluent did not result in a change in the purpose or place of use of municipal water, no State Engineer approval would be necessary, in most instances.

Alternatively, a city that is discharging and returning to the stream system more effluent than it is required could seek return-flow credits for the discharge. A return-flow credit would allow the city to offset the effects of increased diversions for use elsewhere in its water system. Such offsets could allow additional pumping from municipal wells. State Engineer approval would be required for increased diversions based on return-flow credits.

With respect to challenges by downstream users, the issue is one of title to water once it is released back into a public water course. New Mexico law contains an exemption for artificial waters from the general rule that waters returned to the river system are appropriable public waters. The fact that a city has discharged waters in the past does not extinguish the city's right to its use and consumption and, further, does not create a right to the waters in another, and a downstream user could not assert a claim against the city to the use of the discharged effluent, absent agreement by the city. See, § 72-5-27 NMSA 1978 (1997 Repl. Pamp.).

Finally, because of the amount of San Juan-Chama water contracted to members of the planning region, it is important to note that this imported supply of water is entirely consumptive. As a result, if a return flow plan demonstrates that after diversion and use some of the water is returning to the system, the State Engineer will approve increased diversions by that amount. For example if a local entity with a contract for 1,000 acre feet per annum of San Juan-Chama water could demonstrate with a return-flow

plan that its consumptive use averaged only 400 acre feet per annum and that the rest returned to the system, the entity could seek return flow credits for 60% of its diversions. Under this example the State Engineer may authorize diversions of up to 2,500 acre feet per annum, thereby allowing the diverter to consume 40% or 1,000 acre feet per annum of the total, with the balance returning to the system. In the planning region what makes the approval of such a return-flow plan somewhat uncertain is the distance from the place of use back to the river. A successful plan may have to show that return flows are actually getting back to the main stem of the river, as opposed to the tributary basins.

V. The NEPA Process.

Questions have been asked concerning the National Environmental Policy Act, or "NEPA." Under what circumstances does it apply? What does it require? Who needs to worry about it? We set forth below a brief summary to answer these questions.

NEPA is a federal law that addresses process, not substance. It dictates the steps that must be taken to analyze environmental impacts of actions; it does not place limits on what actions may be taken. In a nutshell, NEPA requires that an analysis of environmental impacts be prepared for all "major federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332. "Major federal actions" that must be subject to a NEPA analysis include "projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies." 40 C.F.R. § 1508.18(a). For our purposes, we can presume that any action that either receives significant federal funding or has federal agency involvement will have to be subject to review under NEPA.

For example, it is virtually certain that any construction or development by Santa Fe to bring its San Juan-Chama water from the Rio Grande to the city will be subject to a NEPA analysis. That is because the project will likely be constructed at least partially on federal or Indian land, it will probably be at least partially federally funded, and it will probably need various approvals from federal agencies.

A NEPA analysis can take anywhere from a few months to a few years to complete, depending on the complexity of the project being analyzed. Based on the effects of a proposed action, one of three levels of review will occur: a categorical exclusion (CE), an environmental assessment (EA), or an environmental impact statement (EIS). Generally, federal agency regulations define which categories of actions are eligible for CEs because they typically do not have significant environmental effects, either individually or cumulatively. See 40 C.F.R. § 1508.4. Where a major federal action is proposed but it is not known whether the action significantly affects the environment, and thus whether the requirement to prepare an EIS, is triggered, the agency must prepare an EA. The EA contains a brief description of the project, alternatives to the project and impacts of the project, and concludes with either a finding of no significant impact or the decision to prepare a full EIS.

The NEPA analysis is generally prepared by the federal agency with the greatest involvement in the project. In addition to a "lead agency," which prepares the environmental analysis, there are often cooperating agencies which have a lesser involvement in the project. State or local agencies can be joint lead agencies with a federal agency. Outside entities, including a project applicant, may submit relevant

information, but it is the agency's responsibility to review and verify all information from outside sources.

Preparation of an EIS allows for public involvement beginning very early in the process. As soon as the decision is made to prepare an EIS, the lead agency must publish a Notice of Intent (NOI) in the Federal Register. 40 C.F.R. § 1501.7. After that, the "scoping process" begins, a public process in which the scope of issues to be addressed in the EIS is determined. Id. In the scoping process, the lead agency must invite the participation of "affected Federal, State, and local agencies, any affected Indian Tribe, the proponent of the action, and other interested persons." 40 C.F.R. § 1501.7(a)(1).

The EIS must analyze the environmental impacts of the proposal, and compare those to the impacts of all reasonable alternatives to the proposal. After a draft EIS is completed, it is circulated to the public (40 C.F.R. § 1502.19) and a time period is set for the submission of written comments. 40 C.F.R. § 1503. Often during this period, or earlier during the scoping process, public meetings are scheduled and publicized in local newspapers to allow members of the public to comment on the proposal and its environmental impacts. The agency must provide written responses to all written comments in the final EIS, and should revise the EIS where appropriate. 40 C.F.R. § 1503.4.

After a final EIS is completed, the agency issues a "Record of Decision" which addresses the alternatives and impacts analyzed in the EIS and presents the agency's decision on the project. The ROD must state whether all practicable means to avoid or minimize environmental harm have been adopted and, if not, why not. 40 C.F.R. § 1505.2(a). Furthermore, the mitigation measures established in the EIS "shall

be implemented by the lead agency or other appropriate consenting agency." 40 C.F.R. § 1505.3.

After an EIS is complete but before a decision is made on a proposal, an infrequent but important procedure may be invoked: an agency that finds the project might cause unsatisfactory environmental effects may refer the matter to the White House Council on Environmental Quality (CEQ), if efforts to resolve concerns with the lead agency have been unsuccessful. 40 C.F.R. § 1504.1. CEQ then reviews the matter and decides whether to let it stand, to attempt to mediate a resultion, or to refer it to the President for action. 40 C.F.R. § 1504.3. Over the years, only a handful of referrals to CEQ have been made under these provisions.

Many federal agencies have administrative appeal procedures whereby if someone wants to challenge a project or an EIS, that person must file an administrative appeal to a higher level in the agency. Once those administrative appeals have been exhausted, then interested persons have the option of challenging the legal adequacy of the EIS in court. Such challenges do not usually succeed.

VI. Endangered Species Act Compliance.

For now, we address requirements of the Endangered Species Act only in relation to the endangered Rio Grande silvery minnow. That is because the silvery minnow is the only aquatic species on the federal endangered species list that exists in waters that might be affected by actions taken within the Jemez y Sangre water planning region. While there are other listed species such as the Southwestern willow flycatcher that could be affected by water planning actions, it is unlikely that the existence of these species will significantly affect large-scale water management or planning actions. It is also possible that

additional species will be listed that affect water management in this region, but because we cannot predict such listing actions, we cannot analyze their ramifications at this time.

Two requirements of the ESA will most directly affect water management in this region. First, is the requirement that federal agencies, in consultation with the U.S. Fish and Wildlife Service, ensure that their actions do not jeopardize the continued existence of endangered species or destroy or harm habitat that has been listed as "critical" for such species. 16 U.S.C. § 1536(a). This requirement is triggered by any and all actions that are "authorized, funded, or carried out by" a federal agency. The second key ESA requirement is its prohibition against the unlawful "take" of a listed species unless an incidental take permit or statement has first been obtained from the Fish and Wildlife Service. "Take" means kill, harm, harass or other similar action detrimental to members of the listed species. It is unlawful to "take" even one member of a listed species without an ESA incidental take permit.

Last summer, the Fish and Wildlife Service designated the entire Rio Grande between Cochiti Dam and a few miles upstream from Elephant Butte Reservoir as critical habitat for the silvery minnow. In January, however, a federal court found that designation to have been unlawful and that the designation would be set aside within 120 days. As of now, the designation is in limbo although it has not yet been formally set aside. Fish and Wildlife Service is reinstituting the critical habitat designation process at this time. While the silvery minnow critical habitat will certainly include that stretch of the Rio Grande, it remains to be seen what will be required for that habitat in the way of specific flow characteristics.

The silvery minnow, which used to live throughout the Rio Grande and Pecos basins, is now

restricted to less than 5% of its original habitat, the mainstem of the Rio Grande between Cochiti Dam and Elephant Butte. In fact, over 95% of the tiny remaining silvery minnow population is located in the 60 mile stretch of river between San Acacia diversion dam and Elephant Butte. Unfortunately, this is the part of the Rio Grande most subject to drying during irrigation season.

This means that any action that would reduce flows in the Rio Grande and thereby increase the possibility of drying episodes is likely to cause "take" of silvery minnow. Given the precarious status of the silvery minnow, we can presume that the Fish and Wildlife Service will be unlikely to grant incidental take permits for actions that will reduce flows in the locations and seasons where river drying is a threat to the silvery minnow. In addition, if and when the Fish and Wildlife Service finally establishes critical habitat for the silvery minnow, that designation may specify minimum flows or other flow characteristics which will govern how the river can be managed.

Because native Rio Grande water is fully appropriated already, it is difficult to think of any actions that might be taken in the planning area that would reduce native water flows in the Middle Rio Grande. If, for example, native water used for agricultural irrigation is transferred to a city for urban use, we can assume the State Engineer will not approve any transfer that will result in reduced river flows.

The action most likely to occur which will threaten to reduce river flows is diversion of San Juan-Chama water from the river for consumption. Santa Fe is one contractor in this region planning to divert and consume its San Juan-Chama water, but we should expect that other contractors will follow suit. In fact, San Juan-Chama contractors plan to divert approximately twice their contracted amount of water and

to return half of that amount back to the river as wastewater.

For a contractor to be certain to obtain approval under the ESA from Fish and Wildlife Service, it would have to plan its diversions in such a way as to be sure that the diversions will not cause or contribute to river drying in places containing silvery minnow.[1] The only certain way of doing this would be to ensure that any reductions in river flow caused by the diversions are offset in the locations critical to silvery minnow survival. Although San Juan-Chama contractors correctly note that their San Juan-Chama water was not originally in the river – it is "supplemental" to the river's natural flows, it is likely that the Fish and Wildlife Service will consider the environmental baseline to be what has occurred over the past thirty years since the Project came on line. Ever since the Project came on line, most San Juan-Chama water has ended up flowing down the Rio Grande through the silvery minnow habitat and helping to keep the silvery minnow alive. The Fish and Wildlife Service is unlikely to sign off on diversion and consumption of San Juan-Chama water which would cause jeopardy to or take of the silvery minnow, given the minnow's current precarious state.

The Fish and Wildlife Service will probably propose measures, in the form of reasonable and prudent alternatives or measures, to avoid jeopardizing the existence of the silvery minnow. What such measures might be and how difficult they might be to accomplish is impossible to say.

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[1] In addition, after critical habitat is finally designated, the project must be designed in such a way as not to destroy or adversely modify critical habitat.

It might help to follow the example of Santa Fe's planned diversion of its San Juan-Chama water through the NEPA/ESA compliance steps to see how this might work, At some point when Santa Fe is developing the project, the NEPA process will begin. Perhaps the Bureau of Indian Affairs will be the lead agency if the diversion itself is to be located on the San Ildefonso Pueblo, or else it would probably be the Bureau of Reclamation. BIA/BOR would begin the EIS process and the public would be involved throughout that process. After issuance of the NOI in the Federal Register, public scoping meetings woud probably be held. At some point, BIA/BOR would commence consultation with Fish and Wildlife Service under the ESA, assuming that BIA/BOR determined that the project might adversely affect the silvery minnow. There would be extensive dialogue among Fish and Wildlife, the BIA/BOR and Santa Fe over both the EIS and the ESA consultation. Efforts would be made by all concerned to design the project in such a way as to avoid any potentially adverse effects on the silvery minnow. Since the diversion amounts at issue are relatively small compared to agricultural diversions (and the San Juan-Chama diversions planned by Albuquerque), it is unlikely that a compromise could not be found that satisfies the concerns of each of the parties. Only if those negotiations did not succeed in developing a project that Fish and Wildlife believed would not jeopardize the silvery minnow, would there be a real problem under the ESA.

In that circumstance, Fish and Wildlife would issue a "jeopardy opinion" finding that the project would jeopardize the continued existence of the silvery minnow and presenting a reasonable and prudent alternative that would avoid jeopardy. It would then be up to Santa Fe whether to proceed with the RPA

or drop the project. Santa Fe could not proceed with the project over the objections of the Fish and Wildlife Service.

As this example demonstrates, the question with respect to use of San Juan-Chama water is not exactly whose rights govern – those of the species or those of the contractor? Rather, because Santa Fe (and presumably other San Juan-Chama contractors) will need federal permits and approvals in order to carry out the planned diversions, the question is under what circumstances can those federal permits be granted? The agencies must comply with their obligations under the ESA. So any permits granted will have to be consistent with the ESA.

Furthermore, as noted above, the circumstances under which use of native water from the Rio Grande and its tributaries might be subject to constraints under the ESA is debatable. It is highly unlikely that the State Engineer would approve any water rights transfer that resulted in less water in the river, due to downstream water rights and Compact limitations.

It is, however, also true that the current status quo is killing the silvery minnow, not to mention unlawfully "taking" the minnow. Under the ESA, therefore, one possibility would be that the Fish and Wildlife Service or private citizens might bring suit against persons or entities responsible for that status quo, and seek to change the practices that are pushing the silvery minnow toward extinction. Indeed, this is precisely what the environmental groups who brought Rio Grande Silvery Minnow v. Martinez did in suing the Bureau of Reclamation and the Army Corps of Engineers, claiming that their actions in managing water in the Middle Rio Grande were jeopardizing and unlawfully taking the silvery minnow. Similar claims could

theoretically be brought against other major diverters, especially the Middle Rio Grande Conservancy District, which is the only diverter between Cochiti and Elephant Butte. The likelihood that such a suit might be brought against diverters upstream from Cochiti is significantly less, as they are farther away from the silvery minnow and their diversions are far less than those of MRGCD.

Another possible threat to San Juan-Chama water based on ESA concerns is that the court in Minnow v. Martinez could find that the Bureau of Reclamation has obligations in administering the San Juan-Chama Project (i.e., diverting water from the San Juan basin, storing Project water in Heron Reservoir, delivering contracted water to contractors) to ensure that the Project is administered in such a way as to avoid jeopardy to the silvery minnow or to endangered species in the Colorado River system. Conceivably, this could mean that the Bureau might declare "shortages" and not deliver full contract amounts of water, or that water stored in Heron Reservoir might be used to protect the silvery minnow. Either way, a possible result of court application of the ESA to the San Juan-Chama Project could be reduced contract water deliveries.[2] It is difficult to estimate the likelihood of such an outcome – at this point it is simply a possibility.

On balance, we consider it unlikely that Santa Fe or any other San Juan-Chama contractor would be entirely prevented from using its contracted water due to ESA constraints. A more likely possibility is that a contractor's water deliveries might be somewhat reduced or the certainty of water delivery during dry periods might be reduced, although even these possibilities are pure speculation at this point. A recent federal district court opinion (which will be appealed) has for the first time held that federal water

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[2] There is a legal debate over whether San Juan-Chama water can be used for endangered species at all, with most entities (the State of New Mexico, the federal government, San Juan-Chama contractors, and some other states) arguing that Project water cannot be used for endangered species, but must be consumed entirely within the Middle Rio Grande area in New Mexico. However, even if Project water cannot itself be used for endangered species, it can be traded for native water which can be used for endangered species, so the issue remains the same.

contractors may be able to sue the federal government and recover just compensation for the taking of their property if the government fails to deliver the contracted water due to ESA constraints. See Tulare Lake Basin Water Storage Dist. v. United States, No. 98-101 L., 2001 WL 474295 (Fed. Cl. Ct., April 30, 2001).

One other fact bears mentioning on the topic of how the ESA might affect water planning and management in the Jemez y Sangre region. That is the ESA Collaborative Program that has been underway to address ESA compliance with respect to the silvery minnow. The goal of this collaborative process is to come up with a restoration and recovery program for the silvery minnow that will simultaneously provide ESA take coverage to all entities involved. Currently, there is a draft collaborative program which is being circulated among all the negotiating parties in an attempt to reach a consensus on the program and its ten-year budget. If this collaborative process succeeds, it might well remove the ESA cloud from the Middle Rio Grande.